

BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD  
CENTRAL PUGET SOUND REGION  
STATE OF WASHINGTON

NORTH CLOVER CREEK/COLLINS  
COMMUNITY COUNCIL, AND AUDREY  
CHASE,

Petitioners,

v.

PIERCE COUNTY,

Respondent.

**CASE NO. 10-3-0015**

***(North Clover Creek II)***

**FINAL DECISION AND ORDER**

***I. SYNOPSIS***

*Reviewing an ordinance enacted by Pierce County in order to comply with the Board's ruling in a prior case, the Board determined the County had not exceeded its authority or violated RCW 36.70A.130(2)(a,b) or GMA Goal 11. The Board found the County's action fell within the limited exception to concurrent annual review provided in RCW 36.70A.130(2)(b). The matter was dismissed.*

**II. PROCEDURAL BACKGROUND**

Pierce County Ordinance No. 2010-86s (Compliance Ordinance) repealed a UGA boundary change and zoning designation previously found non-compliant. The Compliance Ordinance also repealed sections of the Mid-County Community Plan requiring "no net loss" of Rural Separator lands in the community plan area. The County's action was challenged by North Clover Creek/Collins Community Council and Audrey Chase (collectively, North Clover Creek).

1 The Prehearing Conference was convened telephonically on February 1, 2011. The  
2 Prehearing Order, issued February 4, set forth the legal issues to be resolved. No motions  
3 were filed during the time scheduled for motions. Briefs on the merits were timely filed.<sup>1</sup>  
4

5 On May 3, 2011, the Board convened the Hearing on the Merits in the Pierce County Annex  
6 Building in Tacoma. Present for the Board were Board members Margaret Pageler, Dave  
7 Earling, and Nina Carter. North Clover Creek was represented by its attorney Daniel Haire.  
8 Audrey Chase also attended. Pierce County was represented by Deputy Prosecuting  
9 Attorney Peter Philley. Barbara Brace of Byers & Anderson, Inc. provided court reporting  
10 services.  
11

12 The hearing provided the Board an opportunity to ask questions clarifying important facts in  
13 the case and providing better understanding of the legal arguments of the parties.  
14

### 15 **III. JURISDICTION AND STANDARD OF REVIEW**

#### 16 Board Jurisdiction

17 The Board finds that the Petition for Review was timely filed, pursuant to RCW  
18 36.70A.290(2). The Board finds that Petitioners have standing to appear before the Board,  
19 pursuant to RCW 36.70A.280(2). The Board finds that it has jurisdiction over the subject  
20 matter of the petition pursuant to RCW 36.70A.280(1).  
21  
22

#### 23 Standard of Review

24 The Growth Management Boards are tasked by the legislature with determining compliance  
25 with the GMA. The Supreme Court explained in *Lewis County v. Western Washington*  
26 *Growth Management Hearings Board*.<sup>2</sup>  
27

28 The Board is empowered to determine whether [county] decisions comply with  
29 GMA requirements, to remand noncompliant ordinances to [the county], and  
30

31 <sup>1</sup> Petitioners' Hearing on the Merits Brief, March 29, 2011.

32 Respondent Pierce County's Prehearing Response Brief, April 12, 2011.

Petitioners' Reply Brief, April 27, 2011.

<sup>2</sup> 157 Wn.2d 488 at 498, fn. 7, 139 P.3d 1096 (2006).

1 even to invalidate part or all of a comprehensive plan or development  
2 regulation until it is brought into compliance.

3 The scope of the Board's review is limited to determining whether a jurisdiction has  
4 achieved compliance with the GMA only with respect to those issues presented in a timely  
5 petition for review.<sup>3</sup>  
6

7 The GMA creates a high threshold for challengers. A jurisdiction's GMA enactment is  
8 presumed valid upon adoption.<sup>4</sup> "The burden is on the petitioner to demonstrate that [the  
9 challenged action] is not in compliance with the requirements of [the GMA]."<sup>5</sup>  
10

11 In *Swinomish Indian Tribal Community, et al. v Western Washington Growth Management*  
12 *Hearings Board*,<sup>6</sup> the Supreme Court summarized the Board's standard of review:  
13

14 The Board "shall find compliance unless it determines that the action by the  
15 [county] is clearly erroneous in view of the entire record before the board and  
16 in light of the goals and requirements of [the GMA]." RCW 36.70A.320(3). An  
17 action is "clearly erroneous" if the Board is "left with the firm and definite  
18 conviction that a mistake has been committed." "Comprehensive plans and  
19 development regulations [under the GMA] are presumed valid upon adoption."  
20 RCW 36.70A.320(1). Although RCW 36.70A.3201 requires the Board to give  
21 deference to a [jurisdiction], the [jurisdiction's] actions must be consistent with  
22 the goals and requirements of the GMA.

23 As to the degree of deference to be granted under the clearly erroneous standard, the  
24 *Swinomish* Court stated:<sup>7</sup>

25 The amount [of deference] is neither unlimited nor does it approximate a  
26 rubber stamp. It requires the Board to give the [county's] actions a "critical  
27 review" and is a "more intense standard of review" than the arbitrary and  
28 capricious standard.

#### 29 IV. PRELIMINARY MATTERS

30 <sup>3</sup> RCW 36.70A.290(1).

31 <sup>4</sup> RCW 36.70A.320(1).

32 <sup>5</sup> RCW 36.70A.320(2).

<sup>6</sup> 161 Wn.2d 415, 423-24, 166 P.3d 1198 (2007) (internal case citations omitted).

<sup>7</sup> 161 Wn.2d at 435, fn. 8 (internal citations omitted).

1 The County in its prehearing brief moved to dismiss issues based on RCW 36.70A.106,  
2 RCW 36.70A.020(11), RCW 36.70A.140 and .035. The Board heard argument from the  
3 parties at the hearing on the merits. The motions are decided in the discussion of Legal  
4 Issue 3 below.

5  
6 Challenged Action

7 On November 2, 2010, the Pierce County Council adopted Ordinance No. 2010-86s  
8 (Compliance Ordinance) which repealed prior Comprehensive Plan Amendment U-8a and  
9 also repealed Mid-County Community Plan policies calling for “no net loss” of Rural  
10 Separator lands. Petitioners here support the repeal of U-8a but challenge the repeal of “no  
11 net loss.”  
12

13  
14 Pierce County enacted the Compliance Ordinance in response to the Board’s August 2,  
15 2010, Final Decision and Order (FDO) in *North Clover Creek, et al., v Pierce County (North*  
16 *Clover Creek I)*.<sup>8</sup> In that matter, three groups of petitioners including North Clover Creek  
17 challenged Pierce County’s approval of a UGA boundary expansion sought by John  
18 Merriman. Amendment U-8a, the “Merriman amendment,” redesignated 5 acres from Rural  
19 Separator to Urban. The *North Clover Creek I* petitioners raised a number of legal issues,  
20 among them, “assert[ing] that the County’s adoption of Amendment U-8a is inconsistent with  
21 provisions of Pierce County’s Comprehensive Plan and the Mid-County Community Plan.”<sup>9</sup>  
22

23  
24 The FDO determined that Pierce County’s Comprehensive Plan incorporates several sub-  
25 area plans called “community plans.”<sup>10</sup> The Mid-County Community Plan (codified at  
26 Chapter 19B.100 PCC) contains a set of land use policies concerning lands designated  
27 Rural Separator. The Rural Separator designation in the Mid-County Plan covers a broad  
28 swath of rural land separating the City of Tacoma on the west from the City of Puyallup on  
29 the east. The Mid-County Plan calls for “no net loss” of Rural Separator lands:  
30

31  
32 <sup>8</sup> GMHB Case No. 10-3-0003c (Aug. 2, 2010).

<sup>9</sup> FDO, at 24.

<sup>10</sup> FDO, at 24, 50.

1.5.1 No net loss of Rural Separator lands shall occur after the adoption of the Mid-County Community Plan.

The FDO singled out Mid-County Community Plan Standard 1.5.1 as one of the bases for finding the Merriman U-8a amendment inconsistent with the County Comprehensive Plan, stating: "In approving U-8a, the County took action *inconsistent* with the Mid-County Community Plan Standard 1.5.1 of no net loss of rural separator lands." <sup>11</sup>

The FDO also identified inconsistency with the County Comprehensive Plan rule requiring a "companion amendment" when a UGA expansion is proposed – PCC 19C.10.055F, and inconsistency with Countywide Planning Policies and Mid-County Community Plan "vision" calling for a rational UGA boundary. As to the Merriman U-8a amendment, the FDO concluded:<sup>12</sup>

#### Conclusion

The Board finds and concludes that Pierce County's action in adopting Amendment U-8a did not violate the GMA notice and public participation requirements. However, adoption of Amendment U-8a was **clearly erroneous** in that the UGA expansion was not necessary to accommodate projected growth, as required by RCW 36.70A.110(2), and the action was **inconsistent** with provisions of the County Comprehensive Plan (PCC 19C.10.055.F), Mid-County Community Plan (Standard 1.5.5) [sic 1.5.1], and Countywide Planning Policies (UGA-2.2). Thus, the adoption of Amendment U-8a **does not comply** with RCW 36.70A.110 and RCW 36.70A.070 (preamble). The Board **remands** this portion of Ordinance No. 2009-71s to the County for action to bring its Plan into compliance with the GMA.

On remand for compliance, the County repealed Amendment U-8a. The Compliance Ordinance also repealed the Rural Separator "no net loss" provisions of the Mid-County Community Plan – Principal 5 and Standards 1.5.1 and 1.5.2. The County did not amend its Comprehensive Plan Procedures – PCC 19C.10.055F, or its Countywide Planning Policies -

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<sup>11</sup> FDO, at 26

<sup>12</sup> FDO, at 33-34

1 UGA – 2.2.<sup>13</sup> Petitioners here challenge the repeal of the Rural Separator “no net loss”  
2 policies.

#### 4 IV. LEGAL ISSUES AND ANALYSIS

##### 5 Applicable Law

6 RCW 36.70A.130(2) requires each county and city to establish a public participation  
7 program setting out schedules and procedures whereby “proposed amendments or  
8 revisions of the comprehensive plan are considered ... no more frequently than once every  
9 year.”<sup>14</sup> All such proposals “shall be considered by the governing body concurrently” to  
10 determine cumulative effect. RCW 36.70A.130(2)(b) provides a limited exception to  
11 concurrent annual review:  
12

13 However, after appropriate public participation, a county or city may adopt  
14 amendments or revisions to its comprehensive plan that conform with this  
15 chapter whenever an emergency exists or to resolve an appeal of a  
16 comprehensive plan filed with a growth management hearings board or with the  
17 court.<sup>15</sup>

18 The legal issues raised by Petitioners here address three components of RCW  
19 36.70A.130(2)(b) highlighted above, which the Board discusses in the following order:  
20

- 21 • Revision to the comprehensive plan – Legal Issue 2
- 22 • Appropriate public participation – Legal Issue 3
- 23 • Resolving an appeal to the Board – Legal Issues 1 and 4

24 An additional key element of RCW 36.70A.130(2)(b) is conformance with the GMA;  
25 however, this component is not challenged in the present case.  
26

##### 27 Legal Issue 2 – Revision to Comprehensive Plan

28 Legal Issue 2, as set forth in the Prehearing Order, states:  
29  
30

31 <sup>13</sup> After briefing and argument on the Compliance Ordinance, the Board entered an Order Finding Compliance  
32 (Jan. 18, 2011) and the *North Clover Creek I* case was closed.

<sup>14</sup> RCW 36.70A.130(2)(a), with listed exceptions.

<sup>15</sup> RCW 36.70A.130(2)(b) emphasis supplied.

1           2) Is the Pierce County Council's act of repealing "no net loss", a procedural  
2 policy under PCC 19C.10.055.F, an "amendment or revision to the comprehensive  
3 plan" within the meaning of RCW 36.70A.130(1)(d),(2)(a)(b)?

4 Petitioners argue that the County's "no net loss" provisions for Rural Separator lands are not  
5 comprehensive plan policies but constitute procedures. If these provisions are procedures,  
6 Petitioners assert, their repeal is not "an amendment or revision of the comprehensive plan"  
7 and would not fall within the limited exception to concurrent annual review provided in RCW  
8 36.70A.130(2)(b).  
9

10 The Petitioners point to PCC 19C.10.055 "Applications for Comprehensive Plan  
11 Amendments" which sets forth procedures and criteria for various amendments to the  
12 comprehensive plan. PCC 19C.10.055F covers applications for amendments to Urban  
13 Growth Areas.<sup>16</sup> PCC 19C.10.055F requires an applicant to justify the need for additional  
14 urban lands or provide "a companion application for reducing the Urban Growth Area in  
15 another location." Petitioners contend the Rural Separator "no net loss" provision is a  
16 limitation on Urban Growth Area amendments that must be read as a component of the  
17 County's Comprehensive Plan procedures. Thus, they argue, repeal of "no net loss" in effect  
18 amended County procedures.  
19  
20

21 In its *North Clover Creek* / FDO, the Board determined the Mid-County Community Plan is a  
22 sub-area plan adopted by Pierce County as a component of its comprehensive plan.<sup>17</sup> The  
23 Mid-County Community Plan contains land use policies focused on preserving the rural  
24 area. Objective 1 of the Mid-County land use policies for Rural Residential Lands addresses  
25 the Rural Separator designation. Principle 5 under this objective established the "no net  
26  
27  
28

29  
30 <sup>16</sup> The FDO found the Merriman amendment was not consistent with PCC 19C.10.055F: "Conclusion  
31 The County's action in adopting Amendment U-8a without a companion ordinance was clearly erroneous in  
32 that it was inconsistent with the County's Comprehensive Plan requirement for a "companion application" –  
PCC 19C.10.055.F - and with the Mid-County Community Plan provisions for "no net loss" of rural separator  
lands – Standard 1.5.1." FDO at 27.

<sup>17</sup> FDO at 24.

1 loss" goal. The portion of the Mid-County Community Plan deleted in the Compliance  
2 Ordinance reads, in full:

3 **Principal 5:** Preserve the rural character in the community by ensuring there is  
4 no net loss of Rural Separator lands.

5 **Standards**

6 1.5.2 No net loss of Rural Separator lands shall occur after the adoption of the  
7 Mid-County Community Plan.

8 1.5.3 Residential Resource zoned land which is consistent with the densities  
9 allowed in the Rural Separator may be considered suitable for the rural separator  
10 designation.

11 As the Board reads them, these Rural Separator "no net loss" provisions are on their face  
12 policy statements. They are *policy* statements in a chapter of land use *policies* in a sub-area  
13 *plan* adopted as part of the County comprehensive *plan*. Amending these provisions  
14 amended the County's plan.

15  
16  
17 The Board finds no merit in Petitioners' strained argument that the "no net loss" provisions  
18 must be read as somehow amending the "companion amendment" procedures of PCC  
19 19C.10.055F. The "companion amendment" provisions of PCC 19C.10.055F remain in  
20 effect to preclude further oversizing of the UGA. In that sense, the County continues to  
21 assure "no net loss" of rural and resource lands, but the companion amendment can be  
22 located anywhere in the County.  
23

24 The Board concludes the County's repeal of the community plan Rural Separator "no net  
25 loss" provisions was an amendment to its comprehensive plan. Thus the County's action  
26 was a revision within the RCW 36.70A.130(2)(b) limited exception to concurrent annual  
27 review.  
28

29  
30 Legal Issue 2 is **dismissed**.

31  
32 **Legal Issue 3 – Appropriate Public Participation**

Legal Issue 3, as set forth in the Prehearing Order, states:

1  
2 3) Is the challenged action in violation of or inconsistent with the Notice and  
3 “appropriate public participation” requirements of RCW 36.70A.020(11), .035  
4 (1)(b-e),(2)(a)(b), .130(1)(d),(2)(a), and .140, PCC 19C.10.055, RCW  
5 36.70A.130(1)(d),(2)(a)(b), and County notice requirements, in that Pierce County  
6 summarily repealed the Rural Separator’s “no net loss” policy without proper  
7 notice or hearing under RCW 36.70A.130(1)(d),(2)(a)(b) and the other notice and  
8 participation requirements identified above?

9 Petitioners contend the Rural Separator “no net loss” policies were “summarily repealed” by  
10 the County without proper notice and public participation. Petitioner’s Legal Issue 2 relies  
11 on:

- 12 • RCW 36.70A.020(11) – GMA Goal 11, Citizen Participation and Coordination
- 13 • RCW 37.70A.035 –Public Participation – Notice Provisions
- 14 • RCW 36.70A.140 – Comprehensive Plans – Ensure Public Participation
- 15 • PCC 19C.10.055 – Applications for Comprehensive Plan Amendments
- 16 • RCW 36.70A.130(1)(d), 2(a)(b)

17 Petitioners’ Prehearing Brief also alleges violation of RCW 36.70A.106.

18 Petitioners argue the notice provided by Pierce County only stated the County was  
19 considering amendments to Titles 19A (containing the Merriman amendments) and 19B  
20 (containing the Mid-County Community Plan). Petitioners’ theory is the County should have  
21 provided notice that its action “would effectively amend the *procedures* for amending the  
22 comprehensive plan under PCC 19C.10.055F.”<sup>18</sup>

23  
24 RCW 36.70A.020(11)

25 The County moves for dismissal of the portion of Legal Issue 3 alleging the Compliance  
26 Ordinance is inconsistent with GMA Planning Goal 11.<sup>19</sup> The County’s theory is that the  
27 Board must scrutinize only the specific GMA requirements related to this Goal and thus, the  
28 Legal Issue cannot be based on the Goal.  
29  
30  
31

32 <sup>18</sup> Petitioners’ Prehearing Brief at 14-15.

<sup>19</sup> RCW 36.70A.020(11): Citizen participation and coordination. Encourage the involvement of citizens in the planning process and ensure coordination between communities and jurisdictions to reconcile conflicts.

1 The County misreads the statute and case law. RCW 36.70A.290(2) gives the Board  
2 jurisdiction to decide petitions challenging “compliance with the goals and requirements” of  
3 the GMA. Except where a specific GMA requirement may set up a conflict with a GMA goal,  
4 the Board must review challenged actions “in light of the goals” as well as the requirements  
5 of the Act.<sup>20</sup> While the Board seldom finds a GMA violation based on a Planning Goal  
6 viewed in isolation from a statutory requirement, the Board is mandated to assess the  
7 County’s action in light of both the goals and requirements of the Act.<sup>21</sup> If a challenge cites  
8 goals of the GMA and specific GMA requirements related to those goals, the Board has  
9 said:  
10

11  
12 The Board looks first to the requirements sections of the Act to determine  
13 compliance. Review is done in light of the goals of the Act, not in lieu of the  
14 goals. If the Board finds noncompliance with a requirement section of the Act, it  
15 then returns to review the goals to determine whether substantial interference  
16 has occurred and whether invalidity should be imposed.<sup>22</sup>

17 The Board also considers the goals in interpreting and applying the mandates of the GMA.  
18 In this case, the Board looks first to the GMA requirements cited in Legal Issue 3, then  
19 considers whether the County was guided by GMA Goal 11.  
20

21 RCW 36.70A.035 and .140

22 The County contends Petitioners’ reference to violation of RCW 36.70A.035 and .140 must  
23 be dismissed as abandoned. The Board notes that other than repeating these statutes in  
24 the statement of Legal Issue 3, Petitioners have made no argument tied to these provisions.  
25  
26  
27

28  
29 <sup>20</sup> RCW 36.70A.320(3)

30 <sup>21</sup> See e.g., *Suquamish Tribe et al v Kitsap County*, 156 Wn.App. 743, at 780-781 (2010), review denied,  
31 *Suquamish Tribe et al v CPSGMHB*, 2011 Wash. LEXIS 21 (Jan. 4, 2011), where the Court of Appeals calls  
32 for the Board to determine, without regard to a bright line rule, whether the County’s action reducing minimum  
density “is consistent with the GMA goals,” and whether using such density in the land capacity analysis  
“creates inconsistencies with the GMA’s goals.”

<sup>22</sup> *Kitsap Citizens for Rural Preservation v. Kitsap County*, CPSGMHB Case No. 00-3-0019c, Final Decision  
and Order (May 29, 2001), at 10.

1 WAC 242-02-570(1) provides in part "Failure ... to brief an issue shall constitute  
2 abandonment of the unbrieffed issue."<sup>23</sup> The Board has explained, "An issue is briefed when  
3 legal argument is provided."<sup>24</sup> It is not enough to simply cite the statutory provision in the  
4 statement of the Legal Issue.<sup>25</sup>

5  
6 In the present case, while Petitioners' briefing includes argument about insufficient notice  
7 and public process, nowhere in the prehearing brief is there any argument or authorities  
8 based on the specific notice and participation requirements of RCW 36.70A.035 or .140.<sup>26</sup>  
9 Therefore the Board finds and concludes that Petitioners' challenge based on RCW  
10 36.70A.035 and .140 was **abandoned**.  
11

12  
13 PCC 19C.10.055

14 Similarly, Petitioners' brief does not contain any facts or arguments explaining how the  
15 Compliance Ordinance notice or process failed to meet any applicable requirements of PCC  
16 19C.10.055. This allegation also must be deemed **abandoned**.  
17

18 RCW 36.70A.106

19 As one example of the truncated process the Petitioners object to, they cite the requirement  
20 to notify the Department of Commerce of proposed comprehensive plan amendments. In  
21 Petitioners' Prehearing Brief, they argue the County failed to provide the proper notice to  
22  
23

24  
25 <sup>23</sup>See *City of Bremerton v. Kitsap County*, CPSGMHB Case No. 04-3-0009c, Final Decision and Order (Aug. 9,  
2004), at 5; *TS Holdings v. Pierce County*, CPSGMHB Case No. 08-3-0001, Final Decision and Order (Sep. 2,  
2008), at 6.

26  
27 <sup>24</sup> *Tulalip Tribes of Washington v. Snohomish County*, CPSGMHB Case No. 96-3-0029, Final Decision and  
Order (Jan. 8, 1997), at 7.

28  
29 <sup>25</sup> *TS Holdings v. Pierce County*, CPSGMHB Case No. 08-3-0001, Final Decision and Order (Sep. 2, 2008), at  
7 (dismissing challenges based on GMA provisions only cited by Petitioner in restating the Legal Issues in the  
case).

30  
31  
32 <sup>26</sup> See also the standard applied by the Courts in review of Board decision under the APA: *Clallam County/Dry  
Creek Coalition v. WWGMHB*, Court of Appeals Div. II, Case No. 39601-7-II (Apr. 20, 2011), Slip Op. fn. 15:  
But the County presents no substantive arguments addressing these alleged errors under the APA.  
Thus, we do not consider any possible errors on these grounds. RAP 10.3(a)(6); *Hollis v. Garwall, Inc.*,  
137 Wn.2d 683, 689 n. 4. 974 P.2d 836 (1999); see also *Holland v. City of Tacoma*, 90 Wn. App 533,  
538, 954 P.2. 290 ("Passing treatment of an issue or lack of reasoned argument is insufficient to merit  
judicial consideration."), review denied, 136 Wn.2d 1015 (1998).

Commerce, as required by RCW 36.70A.106, “thereby denying the public and petitioners appropriate public participation with their state agencies.”<sup>27</sup>

The County objects that this is a new issue which should not be allowed.<sup>28</sup> The County cites WAC 242-02-210(2)(c), requiring the petition for review to contain a detailed statement of issues “that specifies the provision of the act or other statute allegedly violated.”

The Board notes the Petitioners’ argument can be read as a new legal issue alleging noncompliance with a statutory provision not contained in the prehearing order, in which case it is disallowed. Alternatively, it can be read as an example of the lack of input resulting from a flawed process. The Board in *Hensley VIII* ruled notice to Commerce does not apply to actions taken pursuant to a Board remand, as the Board has continuing jurisdiction in those cases to assure GMA compliance.<sup>29</sup> The *McNaughton* decision relied on by Petitioners is distinguishable.<sup>30</sup> In *McNaughton*, the challenged action was not the result of a Board remand; rather, the County and developer had entered into a settlement and stipulated to dismissal of their dispute. When the action was challenged, the Board ruled that compliance with RCW 36.70A.106 was required. Inasmuch as the present action involves a Board remand, the *Hensley* reasoning applies.

Thus, whether considered as a new Legal Issue or as an example of flawed process, Petitioners’ reliance on RCW 36.70A.106 is unavailing.

RCW 36.70A.130(2)(b)

Petitioners point out that the limited exception to concurrent annual review provided in RCW 36.70A.130(2)(b) specifies the County may adopt amendments on a remand from the Board

<sup>27</sup> Petitioners’ Prehearing Brief, at 15.

<sup>28</sup> County Brief at 9-12.

<sup>29</sup> *Hensley VIII v. Snohomish County*, CPSGMHB Case No. 03-3-0015, Order on Motions (2003), at 5 (further holding the petitioner barred from raising the RCW 36.70A.106 objection because it was not raised previously during the compliance hearing.)

<sup>30</sup> *McNaughton v Snohomish County*, CPSGMHB Case No.06-3-0027, Final Decision and Order (Jan. 29, 2007), at 24-28 (County failed to comply with requirement of notice to CTED in adopting a Comprehensive Plan amendment as an outcome of settlement of a matter appealed to the Board).

1 “after appropriate public participation.” The nub of Petitioners’ criticism is alleged lack of  
2 “appropriate public participation” under this statute. The Board therefore reviews the facts in  
3 the record concerning the notice provided and the participation of the public in this matter.<sup>31</sup>

- 4 • On October 10, 2010, Pierce County Council scheduled a hearing on the  
5 proposed Compliance Ordinance before the Community Development  
6 Committee (CDC) on October 25, 2010, with a full Council hearing November 2.  
7 The notice indicated the proposed ordinance included an amendment to the Mid-  
8 County Community Plan.<sup>32</sup>
- 9 • Correspondence dated October 11, 2010, from Michael Steele of the Summit-  
10 Waller Community Association indicates community consideration of the “no net  
11 loss” provision and references two consultant reports, a Rural Separator study  
12 recently completed for the County by Berk and Associates and a report prepared  
13 by Tom Ballard and Associates for Summit-Waller.<sup>33</sup>
- 14 • Additional notice was provided October 20, 2010, sent to the automated e-mail  
15 list for the Graham and Mid-County Community Plan areas (410 individuals), to  
16 the Pierce County Regional Council, to the Mid-County LUAC, and by personal  
17 e-mail to numerous individuals including Petitioner Audrey Chase.<sup>34</sup>
- 18 • Legal notice was published in *The Puyallup Herald* and *The News Tribune*.<sup>35</sup>
- 19 • On October 25, 2010, the CDC held a public hearing on the proposed  
20 Compliance Ordinance. Dan Haire, Audrey Chase, and John Merriman were  
21 among those who provided testimony.<sup>36</sup> Tim Trahimovich of Futurewise sent an  
22 email that same day requesting the County to maintain the Rural Separator no  
23 net loss policies.<sup>37</sup>
- 24 • Prior to the public hearing before the County Council, the Council received letters  
25 from other constituents opposing the repeal of the Rural Separator no net loss  
26 provisions.<sup>38</sup>
- 27 • On November 2, 2010, the County Council held a public hearing on the proposed  
28 Compliance Ordinance. The Council heard testimony from Dan Haire, Audrey  
29 Chase, John Merriman and others.<sup>39</sup> At the conclusion of the public hearing, the  
30 Council voted to adopt the Compliance Ordinance.<sup>40</sup>

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31 See generally, County Brief, at 4-7, Chronological History.

32 Exhibit PCC #1 and 11.

33 Exhibit PCC #1, two-page letter attached.

34 Exhibit PCC #7.

35 Exhibit PCC #20, 21.

36 Exhibit PCC # 2, 8, 10.

37 Exhibit PCC # 18.

38 Exhibit PCC #15, 16, 23.

39 Exhibit PCC #14, #19 at 8

40 Exhibit PCC #13

1 On this record, the Board finds that despite the County's accelerated schedule due to the  
2 compliance deadline, the County provided adequate public notice and opportunity for input  
3 from the interested public. The Board understands why Petitioners are dismayed at the  
4 County's decision.<sup>41</sup> However, the Board is not persuaded that the County's public process  
5 was clearly erroneous, in light of the whole record before the Board and in view of the goals  
6 and requirements of the GMA.  
7

8 The Board concludes Petitioners have not carried their burden of proof of a violation of the  
9 RCW 36.70A.130(2)(b) requirement for adequate public process nor failure to be guided by  
10 the citizen participation goal of RCW 36.70A.020(11).  
11

12 Legal Issue 3 is **dismissed**.  
13

14 **Legal Issues 1 and 4 – Resolving an Appeal to the Board**  
15

16 Legal Issues 1 and 4, as set forth in the Prehearing Order, state:

17 1) Does the Pierce County Council have authority under RCW  
18 36.70A.130(1)(d),(2)(a)(b) to summarily repeal the Rural Separator's "no net loss"  
19 policy during a GMHB ordered compliance hearing which was intended to enforce  
20 compliance through amendment or revision of the Pierce County Comprehensive  
21 Plan?

22 4) During a Pierce County compliance hearing held for the purpose of repealing  
23 a non-compliant Comprehensive Plan Amendment, is the Pierce County Council  
24 authorized under the laws and regulations referenced in paragraphs a - c to  
25 summarily repeal a valid procedural ordinance which is unrelated to the GMHB  
26 compliance order?

27 RCW 36.70A.130(2)(b) allows comprehensive plan amendments to be adopted outside of  
28 the concurrent annual cycle "to resolve an appeal of a comprehensive plan filed with the  
29 growth management board." In Legal Issues 1 and 4, Petitioners contend repeal of the  
30

31 <sup>41</sup> At the hearing on the merits, Petitioners stressed that, because of term limits in Pierce County, many of the  
32 Council members who voted on this matter in November were leaving the Council at year's end and could not  
be held accountable to public input. This is a political matter, of course, which can only be resolved at the  
ballot box. Bad legislative decisions are not necessarily indicative of non-compliant public process.

1 Rural Separator “no net loss” provisions violated RCW 36.70A.130(2)(b) because the action  
2 exceeded what was necessary to resolve the non-compliance which was the basis for the  
3 remand. The question presented for the Board’s review is whether, on remand for  
4 compliance, the County erred by taking more than one measure to resolve the identified  
5 GMA violation.  
6

7 Petitioners explain their position:

8       The emergency provisions of RCW 36.70A.130(2)(b) are not intended to allow  
9 Respondent to use a compliance hearing to make arbitrary and capricious  
10 amendments which are not legally capable of resolving the underlying appeal.  
11 The Respondent is authorized to make amendments under RCW  
12 36.70A.130(2)(b) only when the amendment is legally capable of resolving the  
13 underlying appeal. Respondent’s use of RCW 36.70A.130(2)(b) to make  
14 additional arbitrary and capricious deletions which are incapable of resolving the  
15 appeal is beyond the jurisdictional and statutory authority of RCW  
16 36.70A.130(2)(b). Indeed, the “no net loss” provision of PCC 19B.100 is not even  
17 part of the [FDO].<sup>42</sup>

18 Petitioners’ rely on two Board cases, neither of which the Board finds persuasive. In  
19 *McNaughton, CamWest v. Snohomish County*,<sup>43</sup> the Board stated:

20       The Board notes that there are two statutory boundaries to the appeal exemption  
21 of RCW 36.70A.130(2)(b): “*after appropriate public participation* a county or city  
22 may adopt amendments or revisions to its comprehensive plan *that conform with*  
23 *this chapter* ... to resolve an appeal ... filed with a growth management hearings  
24 board ....” County action taken outside the annual concurrent review in order to  
25 resolve an appeal must not only actually resolve the pending matter (i.e., result in  
26 a dismissal) but must involve appropriate public process and must conform with  
27 the GMA.

28 The “two statutory boundaries” framing the limited exception to concurrent annual review  
29 are (1) appropriate public participation and (2) conformance with the GMA. Petitioners here,  
30 however, focus on the phrase “to resolve an appeal.” The Board finds that in the present  
31  
32

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<sup>42</sup> Petitioners’ Reply Brief, at 4.

<sup>43</sup> CPSGMHB Case No. 06-3-0027, Order on Motions (Oct. 30, 2006), at 17 [emphasis in original].

1 case, the County's action did in fact "actually resolve the pending matter" as it resulted in an  
2 Order Finding Compliance and a dismissal of the underlying petitions.<sup>44</sup>

3  
4 Nothing in the *McNaughton* language, or indeed in the statute, requires a County to limit its  
5 compliance response to the most narrow revisions that could resolve the matter. Indeed, the  
6 Board has long held that a city or county has various options in most cases for complying  
7 with a Board finding of non-compliance.<sup>45</sup> "A city may, within its discretion, choose to do  
8 more than the minimum necessary to comply with an order of the Board."<sup>46</sup> The Board  
9 seldom restricts the jurisdiction to the narrowest compliance option, except where more  
10 complex compliance strategies extend delays that frustrate fulfillment of GMA goals.<sup>47</sup>

11  
12 The second case relied on by Petitioners - *Town of Friday Harbor v. San Juan County*<sup>48</sup> –  
13 illustrates the limits of a county's flexibility in using the limited exception to concurrent  
14 annual review. As the Board explained in its *Friday Harbor* decision, San Juan County  
15 correctly made four changes to its minimum lot sizes to comply with the Board's FDO. But in  
16 the same abbreviated process, San Juan made three unrelated plan amendments including  
17 redesignating 1000 acres of natural resource lands. The Board said:

18  
19       The County's reliance on the .130(2)(b) provision ... is misplaced. The resource  
20 lands redesignations were not part of the noncompliance and/or invalidity provisions  
21

22  
23 <sup>44</sup> *North Clover Creek I*, Order Finding Compliance (Jan. 18, 2011).

24 <sup>45</sup> See, e.g., *Screen II v Kitsap County*, CPSGMHB Case No. 99-3-0012, Final Decision and Order (Nov. 22,  
25 1999), at 6 ("Nothing in the [FDO] restricts the county's ability to achieve compliance with the GMA through  
26 means other than those discussed in the Board's Order"); *LMI/Chevron v Town of Woodway*, CPSGMHB Case  
27 No. 98-3-0012, Order on Compliance (Dec. 20, 1999) at 6 ("It was the Town's choice, and within its discretion,  
28 to rescind all, or part, of these ordinances in its effort to remove inconsistencies and achieve compliance with  
29 the GMA"); *McVittie V v Snohomish County*, CPSGMHB Case No. 00-3-0016, Order on Motion to Reconsider  
(May 4, 2001), at 2-3; *Jensen v City of Bonney Lake*, CPSGMHB Case No. 04-3-0010, Order Rescinding  
30 Invalidity and Finding Compliance (Apr. 26, 2005), at 7; *Petso v City of Kirkland*, CPSGMHB Case No. 09-3-  
31 0005, Order Finding Compliance (Feb. 18, 2010), at 5.

32 <sup>46</sup> *Davidson Serles et al v City of Kirkland*, CPSGMHB Case No. 09-3-0007c, Order Finding Continuing  
NonCompliance and Extending Compliance Schedule (March 12, 2010), at 3, n. 6.

<sup>47</sup> Compare, *Sleeping Tiger v City of Tukwila*, GMHB Case No. 10-3-0008, Order on Limited Extension of  
Compliance Schedule (Apr. 11, 2008) at 3 ("choice in how [to] comply with the mandates of the statute and the  
orders of the Board [may not] extend and exacerbate the very violations at issue.")

<sup>48</sup> *WWGMHB Case No. 99-2-0010c*, Order on Rescission of Invalidity and Compliance/Invalidity (Nov. 30,  
2000), at 6-7.

1 of the FDO. In fact, at p. 9 of the FDO, we specifically held that resource lands  
2 designations were not part of the issues presented in this case.

3 Here, by contrast, inconsistency with the Mid-County Community Plan Rural Separator “no  
4 net loss” policies was one of the Legal Issues identified in North Clover Creek’s original  
5 challenge to the Merriman U-8a amendment.<sup>49</sup> The FDO singled out Mid-County  
6 Community Plan Standard 1.5.1 as one of the bases for finding the Merriman U-8a  
7 amendment inconsistent with the County Comprehensive Plan: “In approving U-8a, the  
8 County took action *inconsistent* with the Mid-County Community Plan Standard 1.5.1 of no  
9 net loss of rural separator lands.”<sup>50</sup> The FDO stated:

11 The County’s action in adopting Amendment U-8a without a companion  
12 ordinance was clearly erroneous in that it was inconsistent with the County’s  
13 Comprehensive Plan requirement for a “companion application” – PCC  
14 19C.10.055.F - *and with the Mid-County Community Plan provisions for “no net*  
15 *loss” of rural separator lands* – Standard 1.5.1.<sup>51</sup>

16 Summing up the multiple grounds for finding the Merriman amendment non-compliant, the  
17 FDO reiterated:

18 The Board finds and concludes ... the action was **inconsistent** with provisions of  
19 the County Comprehensive Plan (PCC 19C.10.055.F), *Mid-County Community*  
20 *Plan (Standard 1.5.5)* [sic 1.5.1], and Countywide Planning Policies (UGA-2.2).  
21 ...The Board **remands** [Amendment U-8a] to the County for action to bring its  
22 Plan into compliance with the GMA.<sup>52</sup>

23 On remand from the Board, it was within the County’s discretion, in addition or as an  
24 alternative to repealing the Merriman amendment, to amend sections of its comprehensive  
25 plan or procedures that had created the inconsistency. The County chose to address the  
26 Rural Separator “no net loss” provisions. The Compliance Ordinance adopted by the County  
27 clearly indicates the “no net loss” amendments were enacted as part of the resolution of the  
28 appeal:  
29  
30

31 <sup>49</sup> FDO, at 24, n. 86, setting out Legal Issues NCC 1.b and Halmo 1.b.

32 <sup>50</sup> FDO, at 26.

<sup>51</sup> FDO at 27, emphasis supplied.

<sup>52</sup> FDO, at 33-34, emphasis supplied.

1       Whereas, the amendment to the Mid-County Community Plan repealing policies  
2 relating to “no net loss of Rural Separator lands” contained in this proposal will  
3 resolve the issue of inconsistency with the Mid-County Community Plan  
4 (Standard 1.5.1).<sup>53</sup>

5       On this record, the Board finds that the County’s repeal of the Rural Separator “no net loss”  
6 policies was a revision to resolve a matter pending before the Board and was well within the  
7 scope of the limited exception to concurrent annual review provided by RCW  
8 36.70A.130(2)(b).  
9

10       Finally, Petitioners assert the County failed to “show its work” in not providing a reasoned  
11 explanation of the “no net loss” deletions.<sup>54</sup> Petitioners point out there is nothing in the  
12 record evidencing County Council review or discussion except for the “conclusory” findings  
13 of fact attached to the Ordinance itself.<sup>55</sup> At the hearing on the merits, attorneys for the  
14 parties engaged in considerable debate about policy reasons for or against retention of the  
15 Rural Separator “no net loss” provisions. The argument concerned hypotheticals generally  
16 beyond the scope of the record before the Board. The Board notes the Court of Appeals has  
17 held “there is no requirement that the [GMA] ordinance state a county’s complete  
18 rationale”<sup>56</sup> so long as substantial evidence in the record supports the Board’s order.  
19 While the Board, like Petitioners, could have wished for a full record of reasoned Council  
20 debate on the pro’s and con’s of the Rural Separator policies, <sup>57</sup> the issue before us is  
21 whether the amendment fell within the scope of the limited exception to concurrent annual  
22 review.  
23

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24  
25  
26 <sup>53</sup> Exhibit PCC # 13, Ordinance, p. 2.

27 <sup>54</sup> Petitioners’ Reply, at 5.

28 <sup>55</sup> Exhibit PCC # 13, at Exhibit D, p. 2, Findings of Fact 11, 12, 13.

29 <sup>56</sup> *Futurewise v. Central Puget Sound Growth Management Hearings Board*, 141 Wn.App. 202, 217, 169 P.3d  
30 499 (2007).

31 <sup>57</sup> See, *Halmo et al v Pierce County*, CPSGMHB Case No. 07-3-0004c, Final Decision and Order (Sep. 28,  
32 2007), at 14-15: “With respect to the various amendments, Halmo argues that the public was not fully involved,  
the County did not explain its revisions, and the modifications were enacted without any analytical  
discussion.... Citizens who have spent four years on an advisory committee analyzing the minutia of various  
zoning categories and their application in their neighborhood, as have the Halmo petitioners, understandably  
expect thoughtful explanations for Council amendments to their proposals. However, while reasoned  
explanations are certainly desirable in a GMA public process, the Board cannot find that they are required by  
the statute.”

1 review. The Board has found the Mid-County Community Plan amendments repealing Rural  
2 Separator “no net loss” provisions were enacted to resolve an issue of inconsistency  
3 identified in the Board’s remand of the Merriman U-8a amendment. The Board concludes  
4 the challenged provisions of the Compliance Ordinance were adopted “to resolve an appeal  
5 of a comprehensive plan filed with the growth management hearings board.”<sup>58</sup>  
6

7 The Board concludes Petitioners have not carried their burden of demonstrating a violation  
8 of the RCW 36.70A.130(2)(b) limited exception to concurrent annual review.  
9

10 Legal Issues 1 and 4 are **dismissed**.  
11

## 12 VI. ORDER

13 Based upon review of the Petition for Review, the Final Decision and Order in *North Clover*  
14 *Creek I*, the briefs and exhibits submitted by the parties, the GMA, prior Board orders and  
15 case law, having considered the arguments of the parties and having deliberated on the  
16 matter, the Board ORDERS:  
17

- 18
- 19 1) Petitioner North Clover Creek has failed to carry the burden of proof in  
20 demonstrating that Pierce County’s adoption of Ordinance No. 2010-86s did not  
21 comply with RCW 36.70A.130(1)(d), (2)(a)(b), RCW 36.70A.020(11), RCW  
22 36.70A.035, or RCW 36.70A.140. Petitioner’s allegations pertaining to Legal  
23 Issues 1, 2, 3 and 4 are **dismissed**.  
24
- 25 2) The case of *North Clover Creek II v Pierce County*, GMHB Case No. 10-3-0015,  
26 is **DISMISSED**.  
27

28 DATED this 18th day of May 2011.  
29

30 \_\_\_\_\_  
Margaret A. Pageler, Board Member  
31  
32 \_\_\_\_\_

<sup>58</sup> RCW 36.70A.130(2)(b)

1  
2 David O. Earling, Board Member

3  
4  
5 Nina Carter, Board Member

6 Note: This order constitutes a final order as specified by RCW 36.70A.300 unless a party  
7 files a motion for reconsideration pursuant to WAC 242-02-832.<sup>59</sup>  
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22 <sup>59</sup> Pursuant to RCW 36.70A.300 this is a final order of the Board.

23 Reconsideration. Pursuant to WAC 242-02-832, you have ten (10) days from the date of mailing of this Order to  
24 file a motion for reconsideration. The original and three copies of a motion for reconsideration, together with any  
25 argument in support thereof, should be filed with the Board by mailing, faxing or otherwise delivering the original  
26 and three copies of the motion for reconsideration directly to the Board, with a copy served on all other parties of  
27 record. Filing means actual receipt of the document at the Board office. RCW 34.05.010(6), WAC 242-02-240,  
WAC 242-020-330. The filing of a motion for reconsideration is not a prerequisite for filing a petition for judicial  
review.

28 Judicial Review. Any party aggrieved by a final decision of the Board may appeal the decision to superior court as  
29 provided by RCW 36.70A.300(5). Proceedings for judicial review may be instituted by filing a petition in superior  
30 court according to the procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil Enforcement.  
31 The petition for judicial review of this Order shall be filed with the appropriate court and served on the Board, the  
32 Office of the Attorney General, and all parties within thirty days after service of the final order, as provided in RCW  
34.05.542. Service on the Board may be accomplished in person or by mail, but service on the Board means  
actual receipt of the document at the Board office within thirty days after service of the final order. A petition for  
judicial review may not be served on the Board by fax or by electronic mail.

Service. This Order was served on you the day it was deposited in the United States mail. RCW 34.05.010(19)